

Jul 12, 2018

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SEAN F. McAVOY, CLERK

ANNE D.,<sup>1</sup>

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

No. 4:17-CV-05075-EFS

**ORDER GRANTING SUMMARY JUDGMENT  
IN FAVOR OF PLAINTIFF**

Before the Court, without oral argument, are cross summary judgment motions. ECF Nos. 13 & 15. Plaintiff, Anne D., appeals the Administrative Law Judge's (ALJ) denial of benefits. See ECF Nos. 1 & 13. Defendant, the Commissioner of Social Security (Commissioner), asks the Court to affirm the ALJ's determination that Anne is not disabled and is capable of performing substantial gainful activity in a field for which a significant number of jobs exist in the national economy. See ECF Nos. 8 & 15. After reviewing the record and relevant authority, the Court is fully informed. For the reasons set forth below, the Court grants Anne's Motion for Summary Judgment and denies the Commissioner's Motion for Summary Judgment.

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<sup>1</sup> To protect privacy, the Court refers to all social-security plaintiffs by first name and last initial. See proposed draft of LCivR 5.2(c). When quoting the Administrative Record in this order, the Court will substitute "Anne" for any other identifier that was used, and – for the sake of readability – the Court will refrain from using brackets to indicate such substitutions.

1                                   **I. Facts and Procedural History**<sup>2</sup>

2           Plaintiff Anne D. was born in 1962. See Administrative Record,  
3 ECF No. 9, (AR) 157. She has long suffered from depression, but  
4 medication seemingly provided sufficient relief until early 2012. See  
5 AR 319.

6           At the end of April 2012, Anne lost her job working as an IT  
7 manager. AR 85, 322. In February 2013, during an appointment for  
8 medication management and a "brief therapeutic interval," Anne  
9 reported, "most days I see myself spiraling down and I can't help it.  
10 I can't cope with the daily stuff." AR 323. Anne's longtime treatment  
11 provider, Deborah D. Dell, ARNP (Nurse Dell), reported that Anne had  
12 regressed. AR 323. Nurse Dell strongly encouraged Anne to meet with  
13 her therapist, Cynthia Benson, MS LMFT (Therapist Benson) "to process  
14 the emotions triggered by the multiple disappointments she has  
15 experienced the past 10 months." AR 323.

16           At the end of April 2013 – exactly one year after she lost her  
17 job – Anne was hospitalized for suicidal ideations. AR 258. She was  
18 treated for one week at an inpatient unit, which changed her  
19 medication regimen. AR 258, 357. Following her release, Nurse Dell's  
20 treatment notes varied from showing "significant improvement" to "no  
21 improvement." AR 327-32. But in August 2013, Anne started taking the  
22 drug Abilify, which showed great promise in treating her depression

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24           <sup>2</sup> Detailed facts are contained in the administrative hearing  
25 transcript, the ALJ's decision, and the parties' briefs. The  
26 Court summarizes only those facts that are relevant to its  
decision; as the ALJ largely relies on Anne's longitudinal  
treatment history, see, e.g., AR 26, the Court sets forth the  
related facts in more detail.

1 symptoms. See AR 347-78 (noting that Anne "has improved since addition  
2 of Abilify").

3 In October 2013, Anne filed her first application for  
4 disability, alleging disability beginning April 30, 2012 (the date she  
5 lost her job). AR 10. In November 2013, Nurse Dell provided a  
6 psychiatric review indicating that Anne had marked functional  
7 limitations (down from extreme before Abilify) in three areas:  
8 (1) restriction of activities of daily living, (2) difficulties in  
9 maintaining social functioning, and (3) difficulties in maintaining  
10 concentration, persistence, or pace. AR 347. Also in November 2013,  
11 Therapist Benson similarly opined that Anne had marked functional  
12 limitations in those same areas. AR 371.

13 A few months later, in December 2013, James Bailey, Ph.D. - a  
14 non-examining, State-agency psychologist - opined that the "evidence  
15 shows that Anne has some limitations in the performance of certain  
16 work activities; however, these limitations would not prevent the  
17 individual from performing past relevant work as a/an Business System  
18 Analyst." AR 85. Anne's claim was denied in January 2014, and she  
19 asked for a review of that decision. AR 19.

20 In early January 2014, Nurse Dell's notes indicated "significant  
21 progress" and that Anne "feels better and that others have noticed a  
22 positive improvement in her mood and demeanor since she started taking  
23 the Ritalin regularly." AR 378. Nurse Dell stated, "Overall, Anne's  
24 mood has significantly improved[,] which was also noted by her  
25 therapist today." AR 378. Even at that point, however, Therapist  
26 Benson's psychological assessment of Anne indicated she suffered from

1 extreme depression and anxiety. AR 354. Then, at the end of January  
2 2014, despite the noted improvement, Anne reported that she "continues  
3 to need lorazepam when she leaves the house except for her therapy  
4 sessions." AR 380. Further, Anne's treatment providers started her on  
5 another medication and discontinued Abilify because of excess weight  
6 gain. AR 380.

7 In February 2014, another non-examining, State-agency  
8 psychologist, Beth Fitterer, Ph.D., reconsidered Anne's claim. AR 89.  
9 In finding Anne only partially credible, Dr. Fitterer stated, "The  
10 objective evidence does not support the level of clmnt reported  
11 limitations. Situational onset with stressors/loss of pets/job and  
12 significant improvement noted with meds at least by 9/2013." AR 95.  
13 Dr. Fitterer also assigned only limited weight to Nurse Dell's and  
14 Therapist Benson's opinions, "as both sources acknowledge significant  
15 improvement with medications started 9/2013." AR 96. And Dr. Fitterer  
16 determined that Anne was not disabled because she could perform past  
17 relevant work as a business system analyst. AR 99.

18 Also in February 2014, after noting that Anne showed "no  
19 improvement" and that her mood was "dysphoric and irritable with  
20 congruent affect," Nurse Dell restarted Anne on Abilify. AR 403. For  
21 the next several months, Anne generally improved; Nurse Dell's notes  
22 reflected progress ranging from "modest" to "significant." AR 401-58.  
23 With the encouragement of her treatment providers, Anne was able to  
24 perform a small amount of volunteer work at the local hospital, hold a  
25 part-time job doing technical writing, and take an in-person math  
26 class at the community college. See, e.g., AR 49.

1       Near April 2015, however, both Nurse Dell and Therapist Benson  
2 indicated that Anne's depression had become worse again. AR 413, 436.  
3 In August 2015, one of Anne's treating physicians, Dr. Jumea Barooah,  
4 M.D., noted that "psychiatry seems to help [Anne,] but lately she has  
5 been feeling as if she has no mission in life – has had thoughts about  
6 self-harm." AR 470. And, at the end of August, Therapist Benson  
7 opined that Anne would likely be off-task 21-30% of the time and would  
8 likely miss four or more days of work per month. AR 515. Therapist  
9 Benson stated that although Anne "has improved to the point she is  
10 able to take one or two classes at a time," doing so causes a great  
11 deal of stress, and Anne "would not do well in a work setting just  
12 yet." AR 516.

13       Also in August 2015, N.K. Marks, Ph.D., an examining physician  
14 and licensed psychologist, conducted a psychological/psychiatric  
15 evaluation. Dr. Marks indicated that Anne had marked limitations in  
16 three work-related areas of functioning. AR 511.

17       On December 8, 2015, Administrative Law Judge (ALJ) Ilene Sloan  
18 issued a decision finding Anne not disabled for purposes of the Social  
19 Security Act. AR 29. The ALJ found that Anne has the following severe  
20 impairments: major depressive disorder, anxiety disorder, and  
21 attention deficit hyperactivity disorder (ADHD). AR 21. Despite those  
22 impairments, however, the ALJ found that Anne has the residual  
23 functional capacity (RFC) to perform "a full range of work at all  
24 exertional levels," so long as such work includes the following  
25 nonexertional limitations: "she can work in a low stress environment  
26 defined as only routine changes in the workplace setting. Contact

1 with the general public cannot be an essential element of any task,  
2 but occasional superficial public contact is not precluded."

3 AR 23.

4       Given those nonexertional limitations, the ALJ found that Anne  
5 is unable to perform her past relevant work as a business systems  
6 analyst, a project manager, or a technical writer. AR 27-28. But the  
7 ALJ went on to find that Anne is capable of performing the  
8 requirements of the following representative occupations: small parts  
9 assembler, maid, mailroom clerk, laundry worker, and warehouse worker.  
10 AR 28-29.

11       The Appeals Council denied Annes's request for review, AR 1,  
12 making the ALJ's decision the final agency action for purposes of  
13 judicial review. See 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481,  
14 422.210. Anne filed this lawsuit on June 1, 2017, appealing the ALJ's  
15 decision. ECF No. 1. The parties then filed the present summary-  
16 judgment motions. ECF Nos. 13 & 15.

## 17                               **II. Standard of Review**

18       The Court will uphold an ALJ's determination that a claimant is  
19 not disabled if the ALJ applied the proper legal standards and there  
20 is substantial evidence in the record as a whole to support the  
21 decision.<sup>3</sup> Substantial evidence is "more than a mere scintilla, but  
22 less than a preponderance. It means such relevant evidence as a  
23 reasonable mind might accept as adequate to support a conclusion."

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26 <sup>3</sup> *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42  
U.S.C. § 405(g)).

1 *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th  
2 Cir. 1988) (citations and internal quotation marks omitted).

3 **III. Applicable Law & Analysis**<sup>4</sup>

4 Anne makes several arguments in favor of reversing the  
5 Commissioner's decision. ECF No. 13 at 8-9. However, because the  
6 Court finds that the ALJ erred in improperly rejecting the opinions of  
7 Anne's medical providers, it need not address her remaining arguments.

8 **A. The ALJ erred in rejecting Dr. Marks' opinion without providing  
9 specific and legitimate reasons supported by substantial  
evidence.**

10 "In disability benefits cases, physicians may render medical,  
11 clinical opinions, or they may render opinions on the ultimate issue  
12 of disability – the claimant's ability to perform work."<sup>5</sup> When an  
13 examining physician's opinion is contradicted, the opinion can be  
14 rejected "for specific and legitimate reasons that are supported by  
15 substantial evidence in the record."<sup>6</sup> The ALJ can accomplish this by  
16 "setting out a detailed and thorough summary of the facts and  
17 conflicting clinical evidence, stating [her] interpretation thereof,  
18 and making findings."<sup>7</sup>

19 Here, Dr. Marks – an examining physician and acceptable medical  
20 source<sup>8</sup> – conducted a psychological/psychiatric evaluation. Although  
21 Drs. Bailey and Fitterer obviously could not have given the June 2014

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22 <sup>4</sup> The applicable five-step disability determination process is set  
23 forth in the ALJ's decision, AR 20-21, and the Court presumes the  
24 parties are well acquainted with that standard process. As such,  
the Court does not restate the five-step process in this order.

25 <sup>5</sup> *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (quotation  
marks omitted).

26 <sup>6</sup> *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996).

<sup>7</sup> *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998).

<sup>8</sup> See 20 C.F.R. § 404.1502.

1 assessment any consideration, their previous disability determinations  
2 are in contradiction with Dr. Marks' more recent assessment. See AR  
3 77-86, 89-100, 508-512. After all, Dr. Marks determined that Anne had  
4 marked limitations in the following three work-related areas of  
5 functioning: making simple work-related decisions, communicating and  
6 performing effectively in a work setting, and completing a normal work  
7 day and work week without interruptions from psychologically based  
8 symptoms. AR 511. Dr. Marks stated as follows:

9       At this point, Anne's depression would interfere with her  
10       ability to maintain employment due to poor concentration,  
11       avoidance, likely poor task completion and confusion as  
12       well as a very negative self-appraisal[,] which could  
13       affect how she approaches tasks and interacts with others  
14       on the job. She would likely give up easily at the first  
15       sign of failure. She already experiences suicidal  
16       ideations and forcing her to work at this point might  
17       increase those ideations.

18 AR 509, 511.

19       The ALJ gave little weight to Dr. Marks's assessment - as well  
20       as the assessments by Therapist Benson and Nurse Dell - and provided  
21       five reasons for doing so: (1) they "are inconsistent with the Anne's  
22       longitudinal treatment history"; (2) they are inconsistent with Anne's  
23       "performance on mental status examinations"; (3) they are inconsistent  
24       with Anne's "documented daily activities"; (4) Anne's "symptoms have  
25       been adequately controlled through counseling and medication  
26       management" since her hospitalization in April 2013; and (5) the  
27       assessments "were based at least in part on Anne's self-report, but,  
28       as noted, her allegations are not entirely credible." AR 26-27.

29       None of the ALJ's five reasons for rejecting Dr. Marks' opinion  
30       are supported by substantial evidence. First, contrary to the ALJ's



1 finding, and as set forth above, Dr. Marks' assessment was perfectly  
2 consistent with the Anne's longitudinal treatment history. Second,  
3 the ALJ provides no explanation for how Dr. Marks' assessment was  
4 inconsistent with Anne's performance on mental status examinations;  
5 Dr. Marks own mental status exam acknowledged that Anne's mental  
6 faculties were within normal limits and that she demonstrated "good  
7 memory skills" and "excellent abstract thought" AR 511-12. That Anne  
8 may have, as Dr. Marks puts it, "above average innate intelligence"  
9 does not make her any less likely to miss work or have difficulties  
10 because of her depression, anxiety, and/or ADHD.

11 The ALJ likewise failed to articulate how Dr. Marks' assessment  
12 was inconsistent with Anne's daily activities. None of the activities  
13 cited by the ALJ were inconsistent with Dr. Marks' assessment of the  
14 workplace limitations that Anne's symptoms would cause. See AR 22-23.  
15 Indeed, Anne's treatment records show that she frequently had  
16 difficulty with daily activities and social interactions that are far  
17 less demanding than a full-time job. And the Ninth Circuit has  
18 repeatedly cautioned ALJs against confusing basic activities of daily  
19 living, such as driving or having a limited number of friends, with  
20 activities of full-time employment.<sup>9</sup>

21 The record lacks any substantial evidence to support the ALJ's  
22 finding that Anne's "symptoms have been adequately controlled through

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23 <sup>9</sup> See *Garrison*, 759 F.3d at 1014, 1016; see also *Reddick*, 157 F.3d at  
24 722 ("[D]isability claimants should not be penalized for attempting  
25 to lead normal lives in the face of their limitations."); *Fair v.*  
26 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1987) (noting that claimants  
need not "be utterly incapacitated to be eligible for benefits  
. . . many home activities are not easily transferable to what may  
be the more grueling environment of the workplace . . . .").

1 counseling and medication management" since her hospitalization in  
2 April 2013. See AR 27. Instead, as demonstrated above, Anne's  
3 longitudinal treatment record shows that she was taking steps to  
4 someday return to employment, and she had periods of progress, but she  
5 was still prone to regressions. Even during the months preceding the  
6 ALJ's decision, Anne's medical care providers were still trying to  
7 find the correct combination of medications and counseling to  
8 stabilize Anne's conditions. See, e.g., AR 413 (noting "mild dysphoria"  
9 under progress and increasing the dosage of one of Anne's  
10 antidepressants).

11 Lastly, although an ALJ may reject an examining physician's  
12 opinion "if it is based to a large extent on a claimant's self-reports  
13 that have been properly discounted as incredible,"<sup>10</sup> Dr. Marks  
14 conducted a clinical interview and a mental status evaluation. "These  
15 are objective measures and cannot be discounted as a 'self-report.'"<sup>11</sup>  
16 Moreover, "the rule allowing an ALJ to reject opinions based on self-  
17 reports does not apply in the same manner to opinions regarding mental  
18 illness."<sup>12</sup> "Psychiatric evaluations may appear subjective,  
19 especially compared to evaluation in other medical fields. Diagnoses  
20 will always depend in part on the patient's self-report, as well as on  
21 the clinician's observations of the patient. But such is the nature  
22 of psychiatry."<sup>13</sup>

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24 <sup>10</sup> *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citation  
25 and internal quotation marks omitted).

<sup>11</sup> See *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017).

26 <sup>12</sup> *Buck*, 869 F.3d at 1049 (9th Cir. 2017).

<sup>13</sup> *Id.*

1 B. The ALJ erred in rejecting Nurse Dell's and Therapist Benson's  
2 opinions without providing germane reasons supported by  
substantial evidence.

3 For purposes of Anne's claim, advanced nurses and/or therapists  
4 are not considered "acceptable medical sources" but are instead "other  
5 sources" whose opinions are entitled to less weight than that of a  
6 physician.<sup>14</sup> An ALJ need only give "germane reasons," supported by  
7 substantial evidence, to discredit other-source opinions.<sup>15</sup>

8 Even so, when considering how much weight to give to other-  
9 source opinions, the Social Security Administration directed ALJs to  
10 consider the following factors: (1) how long the source has known and  
11 how frequently the source has seen the claimant; (2) how consistent  
12 the opinion is with other evidence; (3) the degree to which the source  
13 presents relevant evidence to support an opinion; (4) how well the  
14 source explains the opinion; (5) whether the source has a specialty or  
15 area of expertise related to the claimant's impairments; and (6) any  
16 other factors that tend to support or refute the opinion. SSR 06-  
17 03p.<sup>16</sup> As such, depending on the particular facts of a case, a  
18 treatment provider who is not an "acceptable medical source" may  
19 nonetheless give an opinion that should outweigh the opinion of an  
20 acceptable medical source, such as the opinion of a reviewing  
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23 <sup>14</sup> See *Huff v. Astrue*, 275 F. App'x 713, 716 (9th Cir. 2008). But see  
24 20 C.F.R. § 404.1502 (adding licensed advanced practice nurse to  
the list of "acceptable medical sources" for claims filed on or  
after March 27, 2017).

25 <sup>15</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

26 <sup>16</sup> SSR 06-03p was rescinded effective March 27, 2017. 82 Fed. Reg.  
58444 (March 27, 2017). However, it was in effect when the ALJ  
rendered her decision. See 20 C.F.R. § 404.1527(f).

1 doctor.<sup>17</sup> And, as with all findings by the ALJ, the decision to weigh  
2 one medical opinion more heavily than another must be supported by  
3 substantial evidence.<sup>18</sup>

4 Here, the ALJ assigned "significant weight" to the two non-  
5 examining, State-agency psychologists' opinions. AR 26. In doing so,  
6 however, there is no indication the ALJ considered the applicable  
7 factors listed above. Unlike Drs. Bailey and Fitterer, Nurse Dell and  
8 Therapist Benson were long-time treatment providers who saw Anne on a  
9 regular basis; their opinions were consistent with each other and  
10 every other medical provider that had actually treated or examined  
11 Anne. Nurse Dell and Therapist Benson supported their opinions with a  
12 considerable amount of treatment notes and several tests and  
13 assessments, and they both are experts in treating mental health  
14 problems such as depression and anxiety. Moreover – as discussed  
15 above in regards to the ALJ improperly discounting Dr. Marks' opinion  
16 – the record does not support the ALJ's five stated reasons for  
17 discounting Nurse Dell's and Therapist Benson's opinions.

18 **C. The ALJ's errors warrant reversal and further proceedings.**

19 In summary, the ALJ failed to provide specific and legitimate  
20 reasons, supported by substantial evidence, for rejecting Dr. Marks'  
21 opinion. Similarly, the ALJ did not provide germane reasons,  
22 supported by substantial evidence, for rejecting Nurse Dell's and  
23 Therapist Benson's opinions.<sup>19</sup> Finally, the ALJ did not adequately  
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25 <sup>17</sup> See 20 C.F.R. § 404.1527(f).

<sup>18</sup> See *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).

26 <sup>19</sup> See *Molina*, 674 F.3d at 1111. *C.f.* *Haagenson v. Colvin*, 656 Fed.  
Appx. 800, 802 (9th Cir. 2016) (holding that ALJ's dismissal of

1 set out a detailed and thorough summary of the conflicting clinical  
2 evidence and provide her interpretation thereof while making her  
3 findings.<sup>20</sup>

4 At a minimum, had the ALJ properly considered the opinions of  
5 Dr. Marks, Nurse Dell, and Therapist Benson, the ALJ's RFC findings  
6 and the hypothetical questions posed to the vocational expert would  
7 likely have included additional limitations. Because the ultimate  
8 disability decision may have changed if the ALJ properly considered  
9 those opinions, the ALJ's error is not harmless and requires  
10 reversal.<sup>21</sup>

11 In her motion for summary judgment, Anne requests that the Court  
12 remand to the Commissioner for an immediate award of benefits. ECF  
13 No. 13 at 20. This Court, however, is not in a position to reweigh  
14 the evidence, nor can it conclude that the ALJ would be required to  
15 find Anne disabled after properly evaluating the medical opinions and  
16 Anne's testimony.<sup>22</sup> The appropriate remedy is to remand for the ALJ  
17 to conduct further proceedings. On remand, the ALJ shall reevaluate  
18 the opinions of Dr. Marks, Nurse Dell, and Therapist Benson; reassess  
19 Anne's subjective complaints and make new RFC findings in light of  
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22 opinions of nurse and counselor solely because they were "other  
sources" was reversible error).

23 <sup>20</sup> See *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d  
24 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502  
(9th Cir. 1983)).

25 <sup>21</sup> See *Molina*, 674 F.3d at 1115.

26 <sup>22</sup> See *Leon v. Berryhill*, 880 F.3d 1041, 1046-48 (9th Cir. 2017)  
(affirming the district court's decision to remand for further  
proceedings, rather than remand for payment of benefits, where the  
record reveals conflicts, ambiguities, or gaps).

1 those opinions; exercise her discretion in receiving new, additional  
2 evidence; and make a new disability determination.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is  
5 **GRANTED**.

6 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is  
7 **DENIED**.

8 3. For the foregoing reasons, the Commissioner's final  
9 decision is **REVERSED** and this case is **REMANDED** for further  
10 administrative proceedings under sentence four of 42 U.S.C.  
11 § 405(g).

12 4. The Clerk's Office is directed to enter **JUDGMENT** in favor  
13 of the Plaintiff.

14 5. The case shall be **CLOSED**.

15 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
16 Order, enter Judgment for Plaintiff, and provide copies to counsel.

17 **DATED** this 12<sup>th</sup> day of July 2018.

18  
19 s/Edward F. Shea  
EDWARD F. SHEA  
20 Senior United States District Judge  
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